SUPREME COURT, U. S.
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No. 147

In the Supreme Court of the United States

OCTOBER TERM, 1961

RAYMOND J. BERKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 18-26) is reported at 288 F. 2d 713.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1961. A petition for rehearing was denied on May 17, 1961 (Pet. 26). The petition for a writ of certiorari was filed on June 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for passing two $100 counterfeit notes, the trial court erred in admitting evidence that five other counterfeit $100 notes were found, at the entrance to police headquarters, in a driveway over which petitioner had driven one week earlier while under police escort en route to such headquarters for questioning.

2. Whether the evidence was sufficient to support the conviction.

3. Whether the petitioner was prejudiced by the trial court's failure to direct a verdict of acquittal for a co-defendant whose conviction was reversed on appeal.

4. Whether the prosecutor improperly cross examined the petitioner about prior convictions that the petitioner had disclosed on direct examination.

STATEMENT

The petitioner and one Anthony Verzi were convicted in the Northern District of Ohio on two counts of passing counterfeit $100.00 Federal Reserve notes, in violation of 18 U.S.C. 472. Petitioner was sentenced to four years' imprisonment. The court of appeals unanimously affirmed the petitioner's conviction, but, with one judge dissenting, reversed Verzi's conviction on the ground that there was no proof that he knew the bills were counterfeit (Pet. 25-26).

The evidence may be summarized as follows:

On September 26, 1959, the petitioner and Verzi drove from Cleveland, Ohio, to the city of Ashtabula,

Ohio (Tr. 152-153, 203-204).[1] The petitioner testified that he had won $542.50 at the race track on the previous day (Tr. 201). While in an Ashtabula restaurant, the petitioner told Verzi of his winnings; Verzi then reminded the petitioner that he owed Verzi $100 on a bet on the baseball pennant race (Tr. 156-158, 202-203). The petitioner offered to buy Verzi a suit to settle the debt (Tr. 158, 210). Both men went to the Puritan Clothing Store and the petitioner purchased a suit for himself, paying for it with a $100 Federal Reserve note, serial number G 42437826 A (Tr. 58, 105, 212, 214). The manager of the store testified that the petitioner addressed Verzi as "Mr. Demarco" and asked, "[W]hy don't you buy a suit?" (Tr. 8), but apparently Verzi did not like any of the clothes in the shop (Tr. 160). Both men then proceeded to the Globe Clothiers, approximately two blocks away (Tr. 161), where Verzi found a suit to his liking (Tr. 162, 217). Petitioner paid for the suit with another $100 Federal Reserve note, serial number G 42437828 A (Tr. 29-30, 195, 217-218). Both of these notes were counterfeit (Tr. 102, 105). The two men then left for Cleveland (Tr. 220).

Meanwhile, each store manager became suspicious that the bill he had received was counterfeit, and went to the police station to report the incident (Tr. 12, 32, 67-68). The police captain, upon examining the bills, concluded they might be bogus, and sent out an alarm for the petitioner and Verzi (Tr. 38-39,

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[1] Tr. refers to the trial transcript, a copy of which has been lodged with the Clerk.

69). The two men were spotted some fifteen miles west of Ashtabula by Ohio Highway State Patrolman David Furiate. He stopped the petitioner's car and instructed the petitioner to turn around and head back to the Ohio State Highway Patrol Post located just west of Ashtabula (Tr. 43, 47). The petitioner's automobile was followed by Patrolman Furiate until they reached Geneva, Ohio (ten miles west of Ashtabula), where they were intercepted by Chief of Police Gordon Arvidson of the Ashtabula Police Department (Tr. 49, 72). Patrolman Furiate then took a position just to the front of the petitioner's automobile, and Chief Arvidson followed it (Tr. 49, 72).

Patrolman Furiate testified that, upon arriving at the patrol post, he observed in his rear view mirror that the petitioner swung his automobile in a "jerky motion" in pulling in to the post and went over some lawn shrubbery (Tr. 50). Chief Arvidson testified that when petitioner's car turned into the patrol post it "swerved to the right," "went up onto the lawn and some shrubbery," and "hit some of the bushes" (Tr. 73). He further testified that while he had been able to observe the petitioner's side of the automobile through all of the trip, he momentarily lost sight of it at the moment the car swerved into the post driveway (Tr. 75).

Approximately one week after this incident, the patrol post gardener discovered a packet of five counterfeit $100 Federal Reserve notes in a hole in the driveway. Four of the five notes bore the serial number, G 42437829 A, which was only a digit higher

than one of the bills passed in Ashtabula (see *supra*, p. 3). The fifth bill bore the serial number, G 42437828 A, the same number as appeared on the note passed in the Globe Clothiers shop (see *supra*, p. 3) (Tr. 87-88, 89-91, 105-107).

Patrolman Furiate testified that, following the apprehension of the two men, the petitioner said he received the two $100 bills in a poker game (Tr. 59). At the trial, the petitioner testified that he had won the money at the race track (Tr. 201). Secret Service Agent Robert Lowery testified that on January 12, 1960, petitioner contacted the agent. During the interview the agent said to the petitioner, "That was a pretty cute trick you pulled ditching those [five] notes from the car as you pulled in the Highway Patrol Post". The petitioner "smiled and said there were nine of those notes" (Tr. 115-116).[2]

Petitioner testified that he did not know that the two notes he passed were counterfeit (Tr. 237). He denied throwing anything out of his car (Tr. 227), and stated that he had never seen the packet of five notes found on the patrol post driveway (Tr. 231-232).

ARGUMENT

1. Petitioner's principal contention (Pet. 11-13) is that the trial court erred in admitting into evidence the five counterfeit $100 notes found on the patrol

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[2] Petitioner testified that, in reply to the agent's statement, he said: "Listen, there could have been nine or ninety. I don't know anything about any bills you might have found out there" (Tr. 231).

post driveway (see the Statement, *supra*, pp. 4-5). While evidence of remote or disconnected circumstances that is too weak to be of any probative value is not admissible, here the evidence was relevant to the issue whether the petitioner knew that the two notes he had passed were counterfeit. A number of facts developed at the trial justified the inference that the petitioner threw the five notes from his car to the driveway. The notes were found at the very place where the petitioner, five days earlier and when he was about to be questioned and examined by the police, had swerved his car in an unusual manner so that the observing officer's view was temporarily obstructed (Tr. 50, 75). The serial numbers on the five notes corresponded, except for a variance in the last digit on four of them, to the ones admittedly passed by the petitioner (Tr. 87, 105-107).[4] The testimony of the Secret Service agent indicated that the petitioner had admitted his knowledge of the discarded bills (Tr. 115-116).

If, as the jury apparently concluded, the petitioner had thrown the five counterfeit bills from his car, this fully justified the inference that he knew that the two notes he had previously passed were also counterfeit. The five notes were thus properly admitted in evidence; the weight to be given to them, of course, was for the jury to determine.

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[4] The petitioner admitted passing bills which bore serial numbers G 42137826 A and G 42137828 A. Four of the five bills found bore the number G 42137829 A and the other bore G 42137828 A, or the same as one of the bills that the petitioner passed.

2. The sufficiency of the evidence presents no question warranting review by this Court. Since the petitioner admitted that he passed the bills, the only question at issue was his knowledge of their counterfeit character. In addition to the fact that, as noted above, the jury was entitled to draw the inference that petitioner had thrown five additional counterfeit bills out of the car, there was the further circumstance that petitioner gave conflicting stories as to how he received the money. He first told the police that he won it at poker. At the trial he stated he won it at the races. The bills were cashed in a town other than that where petitioner lived. The jury could properly conclude that all the circumstances together showed guilty knowledge. See *United States* v. *Jonikas*, 187 F. 2d 240, 241 (C.A. 7).

3. There is no merit to petitioner's contention that he was prejudiced because the trial court did not order an acquittal of the co-defendant Verzi before the case went to the jury. Rule 29(b) of the Federal Rules of Criminal Procedure provides in part that:

> If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or *after it returns a verdict of guilty* or is discharged without having returned a verdict. * * * [Emphasis added.]

Thus, if the trial court had deferred ruling on motions for acquittal until after the jury had found both defendants guilty, and had then directed an ac-

quittal of Verzi, its action would have been proper. *United States* v. *Griffin*, 176 F.2d 727, 728 (C.A. 3), certiorari denied, 338 U.S. 952. *A fortiori*, there was no error in allowing the case to go to the jury where it was the appellate court, rather than the trial court, which concluded that the evidence was insufficient to establish Verzi's guilt.

Moreover, the petitioner could not have been prejudiced by the failure to direct an acquittal of Verzi for the trial judge gave separate instructions as to each defendant, and pointed out that Verzi could be guilty only as an aider and abettor (Tr. 279, 281).

4. In this Court the petitioner for the first time makes the claim that the prosecutor was guilty of misconduct in his comments and cross-examination with respect to the petitioner's prior criminal record. Since no objection was raised at the trial and no issue with respect thereto was raised before the court of appeals, the objection comes too late. In any event, it is without merit.

At the outset of the petitioner's direct examination, he was asked about his prior felony convictions. The prosecutor objected, on the ground that defense counsel was "[d]iscrediting his own witness" (Tr. 197, 198). When the court stated that "[u]sually it comes out on cross examination" (Tr. 197), defense counsel replied that "we would like to show it in our direct examination" (Tr. 198). The court replied (Tr. 198): "Well, go ahead if you want to do it that way, but it is generally done the other way." Plainly, there was nothing improper in these statements of either the prosecutor or the court.

On his direct examination, the petitioner stated that he had been convicted of the crimes of burglary, larceny and safe tampering in 1948 and 1954, that he had been imprisoned in the Ohio State Penitentiary, and that he had been released on parole in 1958 (Tr. 198-199). On cross-examination, the prosecutor attempted to trace the petitioner's years in jail. The petitioner stated that he was "first arrested and convicted of a State or Federal crime" in 1954 (Tr. 238-239). When the prosecutor asked about 1942, the petitioner stated that that involved "some Juvenile trouble" and "was not a felony conviction" (Tr. 239). The prosecutor then questioned petitioner with respect to his record after he became 18, the age at which Ohio treats criminal defendants as adults (Ohio Revised Code 2151.01). The petitioner stated that the first time he was in jail after reaching 18 was in 1948 (Tr. 239). He stated that in 1944 he was in the reformatory as a juvenile offender, that he was paroled in 1945 when he was 19 years old, and that in 1946 he was "returned to the institution as a parole violator" when he was 20 years old. Immediately thereafter, he admitted that he was sentenced at that time (1946) to one to twenty years for burglary and safe tampering (Tr. 240). After the prosecutor had questioned the petitioner with respect to his 1954 conviction and the sentence he had served thereunder (Tr. 240-241), the following colloquy ensued (Tr. 241):

> Q. What I am trying to figure out, Mr. Berkley, is how many years you have actually been in jail since you reached the age of 18?

A. Mr. Sennett, you asked me a question. How many felony convictions did I have against my person and I told you two.
Q. Now I am—
A. You are bringing up matters of the State of Ohio that are Juvenile matters, not considered felonies under the State laws.
Q. I am bringing up matters you would rather not have me bring up.

We submit that the prosecutor committed no prejudicial misconduct during his cross examination of the petitioner. The "matters" that the petitioner "would rather not have [the prosecutor] bring up" were not his record as a juvenile offender (which cannot be used to impeach the credibility of a witness), but the fact that the petitioner was attempting to give the impression that his 1946 felony conviction was merely for a juvenile offense. Although the prosecutor did refer to 1942, he dropped the line of inquiry as soon as petitioner stated that that year involved only "some Juvenile trouble" and "not a felony conviction" (Tr. 239). It was petitioner, and not the prosecutor, who sought to convey the impression that his 1946 conviction was for a juvenile offense. The petitioner falsely stated on cross examination that he had first been convicted of a state or federal felony offense in 1954; on direct, he had stated that his first felony conviction was in 1948, a date that was actually 1946. Since prior felony convictions may be used to impeach a witness, and since it was petitioner who was attempting to make it appear that his first felony conviction was merely for a juvenile offense, the prosecutor was warranted in probing the circumstances of

that first conviction to show that in fact it had occurred when petitioner was 20 years old and therefore no longer a juvenile.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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